313 U.S. 592

FILED
MAY 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 1042

CLYDE NIMERICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT; AND BRIEF IN SUPPORT THEREOF.

ARTHUR R. SEELIG,
Counsel for Petitioner.

JOSEPH E. GREEN,
HAROLD I. O'BRIEN,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
Petition for writ of certiorari	1
Summary and short statement of the matter involved	2
Statement of the basis upon which it is contended that this court has jurisdiction to review the judgment in question	5
Statement of the questions presented	6
Statement of the reasons relied on for the allowance of the writ	7
Prayer	7
Brief in support of petition	8
I. Opinion of Court below	8
II. Jurisdiction	8
III. Statement of the case	8
IV. Specification of Errors	18
V. Summary of Argument	19
VI. Argument	21
1. The court's refusal to charge the presumption of innocence was so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision	21
2. The testimony of an assistant United States attorney who did not withdraw from the case as to hearsay statements made outside the presence of the petitioner implicating him in another bank robbery was a most flagrant injustice to the accused and requires a reversal	27

PAGE

3. The government's impeachment of its own witness, Edward Bentz, was highly erroneous and gravely prejudicial to the petitioner 30

4. The reception in evidence of a pistol and shot gun found in petitioner's possession in Chicago five years and eleven months after the robbery was prejudicial error 33

5. The hearsay testimony of the government witness Lynch was prejudicial error 35

6. The petitioner was unconstitutionally deprived of a right to trial by jury upon the issues framed upon his special pleas in bar. There was no waiver of that right 36

(i) The petitioner was entitled to a trial by jury upon the issues formed by the special plea 36

(ii) Trial by jury in a criminal case can be waived only by the express and intelligent consent of the petitioner; and waiver cannot be inferred from a failure to object to a trial without a jury 38

7. The evidence of the petitioner's guilt was not overwhelming. On the contrary, it was directly conflicting and afforded grounds for reasonable doubt 40

VII. Conclusion 46

LIST OF AUTHORITIES.

Agnew v. United States 165 U. S. 136..... 24

Baltimore and Ohio Railroad Co. v. State, 41 Md. 268 33
Berger v. United States, 295 U. S. 78..... 29

Carlisle v. Norris, 215 N. Y. 400, 109 N. E. 564..... 33

Cochran v. United States, 157 U. S. 287.....6, 22, 24

Coffin v. United States, 156 U. S. 432.....2, 3, 23, 24

Commonwealth v. Hudson (Mass.), 11 Gray 64..... 33

Commonwealth v. Merrill, 8 Allen 545..... 37

PAGE

List of Authorities (continued).

Ellicott v. Pearl, 10 Pet. 412 33

Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 82, 63 L. ed. 853, 856, 39 S. Ct. 435 41

Grant v. People (N. Y.) 4 Park. Cr. 527 37

Holt v. United States, 218 U. S. 245 24

In Re Campbell's Will, 100 Vt. 393 33

Jackson v. Varich (N.Y.) 7 Cow. 238 33

Johnston v. Marriage, 74 Kan. 208, 86 Pac. 461 33

Kreinir v. United States, 11 Fed. (2d) 458 26

McCandless v. United States, 298 U. S. 342 40

Patton v. U. S. (1929) 281 U. S. 271 38

People v. Clement, 72 Mich. 116, 40 N. W. 190 37

People v. Johnson, 314 Ill. 486, 145 N. E. 702 32

People v. Maggio, 324 Ill. 516 32

People v. Price, 74 Mich. 37, 41 N. W. 853 37

People v. Zachowitz, 254 N. Y. 192, 172 N. E. 466 34

Solliday v. Commonwealth, 28 Pa. 13 37

State v. Lizotte, 109 Vt. 378 ..... 2, 6, 26

State v. Newton, 39 Wash. 491, 81 Pac. 1002 37

State v. Rosa, 72 N. J. L. 462, 62 Atl. 695 37

State v. Strong, 39 La. 1081, 3 So. 266 37

State v. West, 105 La. 639, 30 So. 119 37

Tyrel v. Prudential Insurance Company of America, 109 Vt. 6 ..... 2, 3, 26

United States v. River Rouge Co., 269 U. S. 411, 421, 70 L. ed. 339, 346, 46 S. Ct. 144 41

Weaver v. United States, 111 Fed. (2d) 603 26

Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 72 L. ed. 761, 767, 48 S. Ct. 417 41

PAGE

STATUTES.

Judicial Code, as Amended, Section 240 (28 U. S. C. A. Sec. 347) 5

TEXT BOOKS.

16 Corpus Juris 925, Criminal Law, Sec. 2283..... 37
Treatise on the Law of Evidence, Third Edition, 1940, Vol. 3, Sec. 909, page 420..... 32

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No.

CLYDE NIMERICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Clyde Nimerick, respectfully prays this Honorable Court to issue a writ of *certiorari* to review that judgment of the United States Circuit Court of Appeals for the Second Circuit, rendered April 9, 1941, in the cause entitled *Clyde Nimerick* v. *United States of America,* numbered 17500, which judgment affirmed two judgments of the United States District Court for the District of Vermont, the first judgment convicting the petitioner of the armed robbery of a national bank, and the second of conspiracy to commit such robbery.

Summary and Short Statement of the Matter Involved.

The petitioner was convicted by separate judgments of the District Court for the District of Vermont, rendered July 3, 1940, of the armed robbery of the Caledonia National Bank of Danville, Vermont, and of conspiracy to commit such robbery. The conviction was affirmed by the Circuit Court of Appeals for the Second Circuit on April 9, 1941.

The matters appearing upon the record which the petitioner contends were errors of sufficient gravity in the instant case and raised questions of sufficient importance in general federal criminal jurisprudence to warrant the review presently sought are:

First: The trial court refused the petitioner's request for a charge to the jury that the petitioner was entitled to the benefit of the presumption of innocence without having given such a charge of its own accord. In thus denying the petitioner's request, the trial court followed two recent decisions of the Supreme Court of Vermont (*Tyrel* v. *Prudential Insurance Company of America*, 109 Vt. 6, at page 23, a civil case, and *State* v. *Lizotte*, 109 Vt. 378, a criminal case), in which that court held that, whatever might be the rule in other jurisdictions, the presumption of innocense is no longer a proper subject of instruction to the jury. Petitioner relies on the case of *Coffin* v. *United States*, 156 U. S. 432, in which this court held that the defendant is entitled to a charge stating in substance that he is presumed to be innocent until the contrary is proved beyond all reasonable doubt and that the presumption is evidence in his favor. The Circuit Court of Appeals expressed doubt as to whether *Coffin* v. *United States*, "still represents the opinion of the Supreme Court" in the following language:

"If the reasoning in *Coffin* v. *United States,* 156 U. S. 432, still represents the opinion of the Supreme Court we should perhaps treat the refusal to charge about the presumption of innocence in the form requested as reversible error. But the later Supreme Court cases we have cited appear to have modified, and perhaps even nullified, the views about the presumption of innocence expressed in *Coffin* v. *United States.* The more recent decisions indicate that the charge asked for would have been misleading and erroneous. * * * For ourselves, we prefer the view of the presumption of innocence taken by Professor Thayer and recently announced by the Vermont Supreme Court in *Tyrel* v. *Prudential Insurance Company of America,* 109 Vt. 6, 23, to that of the decisions which treat the presumption of innocence as evidence to be weighed by a jury in favor of the accused."

The Circuit Court of Appeals has thus held in effect (1) that a defendant is not entitled to a charge that he is presumed to be innocent and that the presumption is evidence in his favor, because the latter clause is no longer proper; and, (2) the request having improperly included comment to the effect that the presumption of innocence is evidence, the defendant may not complain of the refusal to give any instruction whatever upon the presumption of innocence.

Second: An assistant United States attorney engaged in the trial of the case for the prosecution, without withdrawing from participation in the trial, took the witness stand for the government and testified that one Eddie Bentz, a government witness who had pleaded guilty to the crime but who denied that the petitioner was implicated in it, had said, while in cus-

tody and outside the presence of the petitioner, "Why don't you try him" (the petitioner) "for the Brandon job? You've got a better case against him." The Circuit Court of Appeals held that such conduct on the part of a prosecuting attorney was "highly improper" but held that the error was "immediately corrected" by sustaining an objection with an instruction to disregard the observation. The Circuit Court of Appeals further said of this statement, "Indeed the remark tended to suggest a weakness of the proof against Nimerick in the case at bar."

Third: The trial court erred in permitting the government to impeach the testimony of Edward Bentz, its own witness, as will more fully appear from the statement of facts in the brief. The Circuit Court of Appeals indicated, without directly holding, that the impeachment was erroneous but held that it was not prejudicial.

Fourth: The trial court erred in admitting in evidence a pistol and shot gun found in petitioner's possession in Chicago five years and eleven months after the robbery was committed when it was not suggested that the pistol was used in the robbery and it affirmatively appeared that no shot gun was utilized in the commission of the crime or in any overt act connected therewith. The Circuit Court of Appeals held the admission of the evidence error but harmless.

Fifth: The trial court erred in receiving the testimony of the government witness Lynch that a Chicago hotel keeper and his wife were unable to identify a photograph of the petitioner in the latter's absence, when the hotel keeper and his wife were not called as witnesses. The Circuit Court of Appeals held that the reception of the evidence, although error, was harmless.

Sixth: The petitioner filed special pleas of the Statute of Limitations to each of the indictments (R. 5 and 37). To each plea the government filed a replication that the petitioner was a fugitive (R. 6 and 38). The trial court disposed of the issues of fact thus formed by the special pleas and replications on a preliminary proceeding in a nature of a hearing on motion, without the intervention of a jury and without admonishing him that he had a right to such trial. It was and is contended that the petitioner was deprived of his constitutional right to trial by jury upon issues of fact which, if resulting in his favor, would have required his acquittal without having been apprised of his right and expressly and intelligently having waived it; and that failure to demand a jury is not a waiver of that mode of trial under the applicable rule announced by this court. The Circuit Court of Appeals overruled this contention.

The facts upon which the matters thus involved arise are stated in the supporting brief. Reference to the statement of facts there made, in lieu of a repetition thereof here, is here respectfully made.

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

The jurisdiction of this court is invoked pursuant to Section 240 of the Judicial Code, as amended (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938). (28 U.S.C.A., Sec. 347). The judgment in question was rendered by the Circuit Court of Appeals for the Second Circuit on April 9, 1941, and is reported in 118 Fed. (2d) 464.

Statement of the Questions Presented.

The questions presented are:

First: Whether the trial court erred in refusing to charge that the petitioner was entitled to the presumption of innocence and in following to the law of the State of Vermont as enunciated in the case of *State* v. *Lizotte,* 109 Vt. 378, instead of giving a charge of the substance approved in *Cochran* v. *United States,* 157 U. S. 287, *Coffin* v. *United States,* 156 U. S. 432, and other federal cases.

Second: Whether the trial court erred in permitting an Assistant United States Attorney to testify to a conversation with the government witness Bentz outside the presence of the petitioner, in which Bentz said, "Why don't you try him for the Brandon job? You've got a better case against him."

Third: Whether the trial court erred in permitting the government to impeach the testimony of its own witness Edward Bentz.

Fourth: Whether the trial court erred in receiving in evidence the Government's Exhibits 6 and 6-A, being, respectively a 38 calibre revolver and holster, and Government's Exhibit 7, being a 12 gauge repeating shot gun.

Fifth: Whether the trial court erred in receiving the testimony of the government witness Lynch that a hotel keeper and his wife in Chicago were unable to identify the petitioner from a photograph.

Sixth: Whether the trial court erred in entering judgment without the intervention of a jury upon the question raised by the pleas of the Statute of Limitations, and without having apprised the petitioner of his right to a trial by jury upon such pleas.

Seventh: Whether, if all or some of the questions stated above are resolved by holding that the matters indicated, or some of them, constituted error—such error requires a reversal of the judgment upon the entirety of the record.

Statement of the Reasons Relied on for the Allowance of the Writ.

The petitioner maintains that the Circuit Court of Appeals, in affirming the judgment of the District Court, has decided the federal questions above stated in conflict with the applicable decisions of this court cited in the brief in support of this petition, *post,* and has sanctioned procedure in the trial court so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Prayer.

Wherefore, the petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit demanding that court to certify and to send to this court for review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 17500, *Clyde Nimerick* v. *United States of America,* and that such judgment of the Circuit Court of Appeals for the Second Circuit may be reversed.

ARTHUR R. SEELIG,
Counsel for Petitioner.

JOSEPH E. GREEN,
HAROLD I. O'BRIEN,
Of Counsel.